

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 7 2003

CHECKOUT HOLDINGS, LLC, a Delaware
business entity,

Plaintiff - Appellant,

v.

AMPLIFIED HOLDINGS, INC., a Delaware
corporation; CLIFFORD H. FRIEDMAN, an
individual; STEPHEN M. KRUPA, an
individual; CHRISTOPHER MELTON, an
individual; BISHOP LEATHERBURY, an
individual; CONSTELLATION VENTURE
CAPITAL, L.P., a Delaware business entity;
CONSTELLATION VENTURE CAPITAL
OFFSHORE, L.P., a Delaware business
entity; PSILOS GROUP PARTNERS, L.P., a
New York business entity; CCP/PSILOS
AMPLIFIED, LLC, a New York business
entity; NORO-MOSELEY PARTNERS IV,
L.P., a Georgia business entity;
NORO-MOSELEY PARTNERS IV-B, L.P.,
a Georgia business entity; TORONTO
DOMINION INVESTMENTS, INC., a Texas
corporation; and DOES 1-10, inclusive,

Defendants - Appellees.

No. 02-56219

CATHY A. CATTERSON

U.S. COURT OF APPEALS

D.C. No. CV-01-09067-RSWL

MEMORANDUM*

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the Central District of California
Ronald S.W. Lew, District Judge, Presiding

Argued and Submitted April 10, 2003
Pasadena, California

Before: SCHROEDER, Chief Judge, GRABER, Circuit Judge, and
SINGLETON,** District Judge.

Plaintiff CheckOut Holdings, LLC, sued Defendant Amplified Holdings, Inc., and several of its officers, following a transaction in which Defendant purchased some of Plaintiff's assets in exchange for stock in Defendant. Plaintiff appeals the district court's grant of Defendant's Federal Rule of Civil Procedure 12(b)(6) motion, dismissing Plaintiff's Second Amended Complaint.

A. Section 10(b) and Rule 10b-5

Under the Private Securities Litigation Reform Act of 1995 ("PSLRA"), a securities fraud complaint must "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed." 15 U.S.C. § 78u-4(b)(1). A complaint must allege that the defendant made false or misleading statements either intentionally or with deliberate recklessness; if the

** The Honorable James K. Singleton, United States District Judge for the District of Alaska, sitting by designation.

challenged representation is a forward-looking statement, the complaint must allege that the statements were made with actual knowledge of their misleading nature. Fischer v. Vantive Corp. (In re Vantive Corp. Sec. Litig.), 283 F.3d 1079, 1085 (9th Cir. 2002). Further, the complaint must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2) (emphasis added). The PSLRA's standards for pleading scienter apply to private transactions that do not involve a securities exchange. See Falkowski v. Imation Corp., 309 F.3d 1123, 1133 (9th Cir. 2002). On de novo review, we affirm the district court's holding that Plaintiff's First Cause of Action, claiming a violation of Section 10(b) of the Securities Exchange Act of 1934 and of Rule 10b-5, does not state a claim upon which relief can be granted.

1. Falsity

As to the allegation that Defendant misled Plaintiff by claiming that it was worth \$70 to \$80 million: Plaintiff's allegations, at most, can prove only that the statements and omissions were untrue and misleading two months after the transaction was completed. Plaintiff's Second Amended Complaint contains no fact to suggest that the statements and omissions were untrue at the time they were spoken or omitted. Plaintiff's "negative" evidence regarding Defendant's failure

to state that anything significant occurred between the time of the statements and omissions and the time when they were alleged to be untrue is insufficient under the PSLRA's requirement that a securities fraud complaint must "specify each statement alleged to have been misleading [and] the reason or reasons why the statement is misleading," 15 U.S.C. § 78u-4(b)(1).

2. Scienter

Plaintiff cites numerous statements that it claims were misleading and numerous facts that Defendant and its officers failed to disclose. Nowhere in its Second Amended Complaint, however, does Plaintiff plead facts that would create a strong inference that Defendant and its officers knew that a particular statement was misleading or untruthful at the time the statement was made. Mere access to corporate information is inadequate evidence of scienter. Vantive Corp., 283 F.3d at 1086-88. Plaintiff's bald allegations that Defendant officers knew one thing about the matters asserted, but reported another, are inadequate to plead scienter.

Plaintiff's allegation of a "Ponzi Scheme" by Defendant and the Secured Lenders is insufficient to create circumstantial evidence of scienter. Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc., 532 U.S. 588 (2001), which Plaintiff cites to support its position does not discuss pleading requirements and does not diminish Plaintiff's burden to plead contemporaneous facts

demonstrating that Defendant's misrepresentations were knowingly false when made.

B. Section 20(a)

We have held that, "[t]o establish 'controlling person' liability, the plaintiff must show that a primary violation was committed and that the defendant 'directly or indirectly' controlled the violator." Paracor Fin., Inc. v. Gen. Elec. Capital Corp., 96 F.3d 1151, 1161 (9th Cir. 1996). In this case, the alleged primary violation was of Section 10(b). Because we affirm the district court's dismissal of Plaintiff's First Cause of Action, there is no "primary violation" remaining in the case, and we must dismiss the Section 20(a) claim as well.

C. Leave to Amend

In its Opening Brief, Plaintiff failed to discuss the claim that it should have been granted leave to amend its Second Amended Complaint and that the district court abused its discretion in failing to grant such leave. We therefore deem this claim waived. See Martinez-Serrano v. INS, 94 F.3d 1256, 1259 (9th Cir. 1996) ("[A]n issue referred to in the appellant's statement of the case but not discussed in the body of the opening brief is deemed waived.").

AFFIRMED.